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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re T. B., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. V. B., Defendant and Appellant.	D070505 (Super. Ct. No. NJ13589B)

APPEAL from an order of the Superior Court of San Diego County, Gary M. Bubis, Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy, and Daniela Davidian, Deputy County Counsel, for Plaintiff and Respondent.

V.B. (Mother) appeals from the juvenile court's denial of her modification petition that addressed orders concerning her year-old son, T.B. In January 2016, at a contested six-month dependency review hearing, the court determined that returning him to Mother's custody would be detrimental to him. (Welf. & Inst. Code, § 300, subd. (b)(1); all further statutory references are to this code unless specified.) The court found Mother had been provided with reasonable reunification services by the San Diego County Health and Human Services Agency (the Agency), then terminated those services and set a permanency planning hearing. (§ 361.5, subd. (a)(1)(B).)

Mother's petition for modification was filed in June 2016, seeking to modify the existing orders by placing T.B. with her and ordering family maintenance or additional reunification services. (§ 388.) The court ruled that she had not set forth a prima facie case of entitlement to the relief requested and declined to order an evidentiary hearing on the petition. Mother contends the court abused its discretion in that respect. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) Based on her participation in recent months in substance abuse treatment and visitation, she argues the court should have acknowledged that her petition established a prima facie case of significantly changed circumstances, to justify ordering an evidentiary hearing.

The Agency responds that the record shows no abuse of judicial discretion in denying the request for an evidentiary hearing. We agree and affirm the order.

I

BACKGROUND

A. Jurisdiction, Disposition, and Termination of Reunification Services

T.B. was removed from Mother's custody when he was two months old, when the Agency filed a dependency petition in April 2015 that alleged he was at substantial risk of harm due to Mother's failure or inability to supervise and protect him adequately. That week, he and Mother were found in a vehicle stolen from her father (the maternal grandfather), with three other adults, all of whom had outstanding felony warrants for arrest. Police found drug paraphernalia in the vehicle and arrested all the adults. Mother admitted to being under the influence of heroin and marijuana at the time. T.B. was placed in foster care. His father is unknown.

The Agency prepared detention and jurisdictional reports stating that in 2008, Mother's parental rights to T.B.'s older half-sister, F.B., had been terminated. Mother had used drugs since her teenage years, showed signs of mental illness, had been involved in domestic violence and had been unable to care for F.B. F.B. was adopted by the maternal grandfather.

After being taken into custody in April 2015, Mother acknowledged that she self-medicated with drug use and needed help. Since losing custody of her daughter in 2008, she had not been able to take steps to address her substance abuse or improve her mental health. She had twice tested positive for marijuana during her pregnancy with T.B., and an initial referral for neglecting him had been found inconclusive. Mother had a record

of criminal convictions for drug related offenses and had been arrested several times on vehicle related and other offenses.

In May 2015, the court made jurisdictional and dispositional findings in T.B.'s case at a settlement conference, and he remained in foster placement. The court ordered that Mother be provided with reunification services, and her plan told her that such services could be terminated after six months, due to the child's relatively young age. (§ 361.5, subd. (a)(1)(B).) Liberal supervised visitation was ordered and Mother was referred to substance abuse treatment and for mental health evaluations. In July 2015, T.B. was placed in a concurrent foster home with foster parents who wanted to adopt him (the caregivers). A court appointed special advocate (CASA) volunteer was appointed for him in August 2015.

In June 2015, Mother was arrested and held in custody for drug related offenses. On her release, she entered residential substance abuse treatment at the Family Resource Center (FRC), where she had twice weekly visits with T.B. She dismissed herself from the facility in September 2015.

As of October 6, 2015, Mother was homeless and the maternal grandfather got her a hotel room for a while. He suspected at the time " 'that she was coming off from drugs.' " He was unable to provide for T.B., although he facilitated visits between T.B. and F.B.

Mother was again arrested in October 2015 for a parole violation and possession of a narcotic controlled substance. By November 2015, Mother was an outpatient in a treatment program and was starting to attend 12-step meetings. She was hoping to return

to the FRC when it had an opening. She was not complying with her reunification plan, which included drug testing. Between October 2015 and April 2016, she did not participate in the weekly supervised visitation that she was allowed.

At the contested six-month review hearing in January 2016, the court found the Agency had provided Mother with reasonable services. The court made a finding that returning T.B. to her custody would be detrimental, and the services provided had been reasonable. She had not made substantive progress with the provisions of her case plan, and the services were terminated. The caregivers were granted de facto parent status. The court scheduled a permanency planning hearing for May and then July 2016. (§ 366.26.)

In March 2016, the Agency learned from Mother that she was being held in custody in a high security unit, and could not participate in visitation until her release, which was to occur the next month. In early April 2016, Mother went back to the FRC and started its orientation, the first of three phases. She was participating in substance abuse treatment as part of criminal drug court, and was also attending parenting classes and individual therapy. In April and May 2016, she visited T.B. every week.

B. Modification Petition

In her petition filed in June 2016, Mother sought modification of the orders terminating her reunification services and setting further hearings. In support, she submitted a letter from a substance abuse counselor at the FRC stating Mother was an inpatient in a substance abuse program there. She also participated in criminal drug court and was complying with its requirements of random drug testing and attendance at

12-step meetings. Three fellow residents submitted letters stating she was showing them her motivation to succeed there. Her petition thus argued that it would best serve T.B.'s interests to return him to her care, with reunification or family maintenance services. She wanted T.B. to have a relationship with his half-sister, who lived with the maternal grandfather, with whom she was still close.

A few days after the filing of the petition, the court heard argument on it. Mother's attorney pointed out she had no pending criminal charges and was testing negative for all illegal substances. The Agency and the minor's counsel responded that T.B. had been in a stable placement for a year and was already being provided with visitation with his half-sister F.B. They argued Mother could show no more than that her circumstances were beginning to change, such that she had not set forth a prima facie showing that the requested change would be in T.B.'s best interests.

In ruling on the petition, the court stated that it had read and considered the entire court file, which included the Agency's and CASA volunteer's reports. The court determined that it was unable to make a prime facie finding of changed circumstances and best interests in support of modification. The request for an evidentiary hearing on the petition was denied. The court ordered that Mother be provided with two visits per week, on condition the maternal grandfather was willing to supervise her visits. A contested permanency planning hearing was scheduled for July 2016. (§ 366.26.) Mother appealed.

II

MODIFICATION MOTION: ANALYSIS

A. Applicable Standards: Two Prongs; Prima Facie Case

As the petitioner, Mother had the burden to show by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote T.B.'s best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; § 388, subd. (a).) To trigger the right to a hearing on the petition, she needed to set forth a prima facie showing of both of those elements. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*).) Although the court must broadly construe the request for modification, "if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Ibid.*)

In deciding whether the petition makes the necessary showing, the juvenile court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) The modification factors to be considered include (1) the seriousness of the problem leading to the dependency; (2) the relative strength of the child's bonds with the parent and with the caretaker; (3) the degree to which the problem could be easily resolved. (*In re Kimberly F., supra,* 56 Cal.App.4th 519, 532.) If it is

apparent that the best interests of the child may be promoted according to the material in the modification request, a hearing shall be ordered. (*Id.* at pp. 526-527, fn. 5.)

This court reviews the grant or denial of petitions for modification for abuse of discretion. (§ 388; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641-642.) We inquire if the lower court exceeded the limits of legal discretion by making any arbitrary, capricious, or patently absurd determinations. (*In re Stephanie M.*, *supra*, 7 Ca1.4th at p. 318.)

B. Analysis: Changed Circumstances; Best Interests

On appeal, Mother contends she was entitled to an evidentiary hearing on her claims of changed circumstances that significantly affected T.B.'s best interests. She points out that after the time of the six-month orders, she started participating fully in inpatient substance abuse treatment, and was successfully completing her conditions of parole. She was testing negative for drugs and had a relapse prevention plan. Individual therapy was aiding her in gaining insight about the negative effects of her substance abuse and about her need to make progress on her treatment goals. For example, she understood the necessity to eliminate her triggers for drug abuse, such as avoiding people and relatives who had a negative impact on her life, and she was doing so. Her significant efforts were being recognized not only by her treatment counselors but also her fellow participants at the treatment program. Her plans included obtaining stable housing, education and employment.

Since April 2016, Mother had been participating in weekly visitation that was developing her bond with T.B. She argued that further assistance to her in the form of

family maintenance services would most likely promote his best interests, since they enjoyed each other's company. (*In re Kimberly F.*, *supra,* 56 Cal.App.4th at pp. 530-532 [best interests analysis].) It would also be positive for him to spend time with his half-sister F.B., and she would be able to pursue that because she maintained a close relationship with the maternal grandfather.

In making its rulings, the juvenile court appropriately considered the entire factual and procedural history. (*In re Justice P.*, *supra*, 123 Cal.App.4th 181, 189.) On the issue of changed circumstances, the court acknowledged that Mother had faced serious problems that led to the inception of the dependency case. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, 532.) Both before and after 2008, when her parental ties with F.B. had been severed, Mother did not take prescribed medication for the mental illnesses with which she had been diagnosed, which included bipolar disorder, PTSD, and borderline personality disorder. During the dependency proceedings for F.B., Mother had been hospitalized for mental health issues and had attempted suicide. The June 2016 letter from the substance abuse counselor stated, "[I]t appears that [Mother] is making an effort in making better choices this episode of treatment versus the last attempt in treatment" (in Sept. 2015). As of the time of the petition, Mother was still in the orientation or early stages of her recovery.

The court was entitled to consider the relative strength of the child's bonds with the parent and with the caregivers. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, 532.) Upon resuming visitation with Mother in April 2016, T.B. initially did not show any reaction when he saw her and did not call her by name. He started playing with Mother

by the middle of the visitation hours and seemed to enjoy their time together, although he did not have any evident difficulty when the visit ended. He was glad to see his caregiver afterward and showed affection to her.

T.B.'s caregivers believed, along with Mother, that it was important for him to have a sibling relationship with F.B. The caregivers facilitated monthly visits between the children and planned to maintain that contact. The caregivers told the CASA volunteer they were glad to have F.B. and the maternal grandfather visit and stay involved in T.B.'s life.

In making its rulings, the court reviewed the file, noting that the case was past the 12-month date on the petition. Even acknowledging that Mother was doing great at the present, the court said that the problem presented was the history of the case, which was "really very difficult to come to grips with. And given the facts . . . this child was under the age of three. The law is very clear that young children deserve permanency. I give Mother all the credit in the world for being clean. But even if all the evidence came up right on the eve of the [section 366.26 hearing] I would not be convinced that it would be worth the risk to try to give mom additional time even to the 18-month date. Because that's basically what it would be. [T]aking a gamble. I don't believe there has been a prima facie showing."

These findings are well supported. Although Mother provided the court with some evidence in support of her argument that she will be able to continue successfully addressing the essential issues which brought T.B. into the dependency system, the efforts she showed were of relatively recent origin. The juvenile court was justified in

determining that it would be unduly risky or a gamble to assume that Mother's problems with her ability to parent safely could be easily resolved. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th 519, 532.)

The juvenile court could also reasonably conclude on this record that the existing orders were serving T.B.'s best interests. (§ 388.) When visitation resumed in April 2016 after several months of separation, it took a while for T.B. to get to know Mother again. He continued to look to the caregivers he had known since July 2015 for having his needs met. Even construing the petition liberally, it failed to set forth facts showing that the child's best interests would very likely be promoted by the proposed changes in the orders. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463-464.) Facts about the early stages of the improvement that Mother was showing on handling her problems, as alleged in her petition, would not have supported a conclusion that the modifications she was requesting would most appropriately protect T.B. (*Zachary G.*, *supra*, 77 Cal.App.4th at pp. 806-808.) We find no error or abuse of discretion in the juvenile court's decision to proceed without granting an evidentiary hearing on the modification petition. (*In re Marcelo B.*, *supra*, 209 Cal.App.4th 635, 642.)

DISPOSITION

The order is affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.